

1 HBGQATIC

1
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK
4 -----x
5 UNITED STATES OF AMERICA,
6 v.

7 15 CR 867 (RMB)

8 MEHMET HAKAN ATILLA,
9 Defendant.
10 -----x11 New York, N.Y.
12 November 16, 2017
13 11:00 a.m.

14 Before:

15 HON. RICHARD M. BERMAN,
16 District Judge

17 APPEARANCES

18 PREET BHARARA
19 United States Attorney for the
20 Southern District of New York
MICHAEL LOCKARD
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25 -Also Present-

Special Agent Jennifer McReynolds
Michael Chang-Friedan
Asiye, Interpreter (Turkish)
Seyhan Sirtalan, Interpreter (Turkish)

HBGQATIC

1 (In open court)

2 THE COURT: Good morning, everybody. So on my to-do
3 list for today is to start with the Mr. Atilla's motion.

4 We should mention first we have a Turkish language
5 interpreter and make sure Mr. Atilla is able to understand with
6 the help of the interpreter.

7 THE DEFENDANT: Yes, I can understand. Thank you.

8 THE COURT: Great. Thank you.

9 So I was saying next that I thought I would start with
10 Mr. Atilla's motion to dismiss the indictment in this matter
11 and then take a short break, and then we might talk about the
12 motions in limine.

13 At the outset, I am going to say what I've said
14 before; and that is, that in discussing the motion to dismiss,
15 and particularly in discussing a court resolution and the in
16 limine motions as well, this discussion bears no impact upon
17 the question of whether or not Mr. Atilla is guilty of any of
18 the charges in this case. He is presumed to be innocent, has
19 been up until now, will continue to be until such time, if it
20 were to come about, that a jury determines that he is guilty
21 beyond a reasonable doubt. So I don't want anything that I say
22 today to be construed as in any way impinging on that
23 fundamental U.S. legal system principle.

24 So, I have before me the motion of Mr. Atilla through
25 counsel and the reply. Those are dated October 9, 2017 and

HBGQATIC

1 October 23, 2017. And that is the defense motion to dismiss,
2 and in the alternative for severance. And I have the
3 opposition dated October 16, 2017 from the government. Did
4 counsel wish to be heard on that motion or did you want me to
5 rule on the papers?

6 MR. ROCCO: Your Honor, I think given the lateness of
7 the hour, it makes most sense for your Honor to rule. If there
8 is anything that the Court wants to hear, I'd be happy to
9 address any issue that your Honor may have.

10 THE COURT: I appreciate that. So some of these
11 issues, indeed, substantially all -- not entirely all -- but
12 were resolved previously in the ruling or related to the ruling
13 on Mr. Zarrab's motion to dismiss, but this is a new
14 indictment, it has different issues and, hence, the opportunity
15 if you wish to say anything before I do rule.

16 MR. ROCCO: Well, your Honor, I do think that this
17 indictment is significantly different than the original
18 indictment. It raises the question of whether --

19 THE COURT: You mean the original indictment.

20 MR. ROCCO: The original indictment and the preceding
21 superseding indictment that were filed against Mr. Zarrab,
22 including the indictment that was filed against Mr. Atilla.
23 Virtually, the original indictment against Mr. Atilla that
24 named Mr. Atilla was bereft of any reference to -- I think
25 there were three references to him in the indictment. There

HBGQATIC

1 were no factual, specific factual allegations.

2 The newer indictment added, I want to say, roughly 20
3 pages of factual allegations against Mr. Atilla and Halkbank,
4 and raises specifically what we describe as errors in the
5 government's indictment that talks about violations of
6 sanctions interchangeably with the idea of prohibitions. And
7 our position in those papers is, quite frankly, a violation of
8 a sanction is not a violation of a prohibition. And in order
9 for someone to be prosecuted for a violation of IEEPA, there
10 needs to be underlying prohibitions that have been violated,
11 and that requires a predicate finding by the Department of
12 Treasury that, in fact, there is conduct to be prohibited. The
13 government uses the word sanctions.

14 THE COURT: The government --

15 MR. ROCCO: Uses -- I apologize -- the words sanction,
16 prohibition interchangeably. That is not the way the Sanctions
17 Regime has been established.

18 There was interaction with OFAC and Halkbank that's
19 reflected in many of the government's exhibits that we have
20 seen and have been marked. I think there is something like
21 6,000 exhibits marked for trial that we are still working our
22 way through, and in fact haven't gotten all of them. Most
23 importantly, transcripts and translations of transcripts that
24 were originally in Turkish.

25 But going back to the indictment and the motion to

HBGQATIC

1 dismiss, Judge, this use of prohibition and sanction in an
2 interchangeable way is a fundamental misconstruction of the
3 Sanctions Regime, and, quite frankly, a violation -- a
4 sanctionable activity is not illegal activity, and, therefore,
5 cannot be criminal activity. Prohibited activity can be
6 criminal activity and can be a predicate for prosecution.
7 That's not what's going on here. And the further issue we make
8 given the way the government has pled these schemes in the
9 indictment, it's clear to us that --

10 THE COURT: This is in the so-called (S4)?

11 MR. ROCCO: The indictment -- if I may, your Honor,
12 the indictment that I'm referencing is the indictment that we
13 address the motion to and that is (S4). The briefing on (S4)
14 on our motion is substantially different than our briefing on
15 the earlier indictment (S3).

16 But as we say in our motion to dismiss, the
17 government, in effect, pleads two separate schemes: A scheme
18 that is located entirely outside of the United States and a
19 scheme that's located -- apparently touches American banks.
20 And there is no specific factual allegation connecting
21 Mr. Atilla to the activity in the United States.

22 The government has its typical bromide, well, the
23 activity is -- there are allegations in the indictment --
24 general allegations in the indictment that would cover that and
25 make the connection alleging that this is in fact one

HBGQATIC

1 conspiracy that started outside the United States and then came
2 back on American banks.

3 We say and ask the Court to use its discretion and
4 take a peek behind those allegations, those general allegations
5 and require the government to plead a specific fact in support
6 of that allegation because it is a predicate essentially for a
7 violation of IEEPA and a violation of mail fraud statute, and a
8 violation of the Klein conspiracy.

9 So, in a very brief nutshell, Judge, that's what's
10 different about this briefing regarding this indictment. And
11 as Mr. Zarrab has not participated in any of these briefings,
12 obviously, the only word, the only arguments have been advanced
13 by Mr. Atilla. And I just note for the record that apparently
14 Mr. Zarrab is not here again today, and we haven't seen him, as
15 I think I indicated last time.

16 THE COURT: The record can reflect that he is not here
17 nor is his counsel, Mr. Brafman.

18 MR. ROCCO: Nor have they been here on the last two or
19 three occasions. But, Judge, if you have questions, I'm happy
20 to answer them as best I can. That's basically the thrust of
21 the arguments we made in connection with the latest motion to
22 dismiss indictment (S4).

23 THE COURT: Mr. Lockard, did you want to respond.

24 Just so I'm clear, you were saying your first point
25 was that there has to have been some administrative agency

HBGQATIC

ruling or determination before there could be this indictment?

MR. ROCCO: Sanctionable activity, your Honor, is not criminal activity, and the way the statute regs, the Sanctions Regime is set up is that there is a requirement that there be a finding by the Secretary of Treasury or the President, your Honor. We briefed it, I just don't recall, an executive or someone associated with the Executive Department. But essentially there has been sanctionable activity. If there is sanctionable activity determinations, that person can be prohibited from dealing with U.S. financial institutions, and it becomes the attempt to deal with U.S. financial institutions that is -- that may be a predicate for an IEEPA violation.

This is clear in the law. It's clear in the regulations and statute. In fact, it's clear in many of the OFAC communications that the government has produced in discovery here between OFAC, The Department of Treasury and Halkbank.

The government tries to argue -- and this is clear only in the most recent indictment -- that Mr. Atilla engaged in activities that were designed to conceal sanctionable activity that was allegedly engaged in by Halkbank from U.S. authorities, and that in itself, the government argues, is an effort to evade sanctions.

But that again raises the issue of prohibited activity, and that is not a prohibited activity. So the U.S.

HBGQATIC

1 may not like what's being done abroad, but the way the
2 Sanctions Regime has been established is it looks inward. It
3 is nuanced. It's not blunderbuss. It is aimed principally at
4 American financial institutions, and it is designed to block
5 access by foreign banks to American financial institutions when
6 and if foreign banks engaged in sanctionable activity, but that
7 requires a preliminary determination by the Department of
8 Treasury that that institution -- here, it would be Halkbank --
9 was barred from dealing with U.S. financial institutions. That
10 never happened.

11 THE COURT: So there was this -- well, let me hear
12 from the government. He was about to get up, I think, to
13 respond to your point.

14 MR. ROCCO: Thank you, your Honor.

15 MR. LOCKARD: Your Honor, I hear Mr. Rocco raising
16 basically two arguments in support of the motion to dismiss:
17 One about the legal distinctions between secondary sanctions
18 which authorize the imposition of sanctions versus primary
19 sanctions under the Iranian Transactions and Sanctions
20 Regulations; and, secondly, some formulation of the charged
21 conspiracy as encompassing two schemes, one of which is
22 entirely abroad. I'll address each of those two arguments.

23 And I think the response to the first argument is the
24 charge that Mr. Rocco is arguing against is a strawman charge.
25 That's not the charge that is brought in the indictment. The

HBGQATIC

1 indictment does not charge criminal violations of the secondary
2 sanctions.

3 What the indictment charges is that under Section 1705
4 of the IEEPA, there was a criminal violation of what is
5 prohibited under the statute which is to violate, attempt to
6 violate, conspire to violate or cause a violation of any
7 license, order, regulation or prohibition.

8 So, the secondary sanctions include prohibitions. One
9 of those prohibitions is transactions designed to avoid other
10 prohibitions, and so very clearly under the sanctions it is
11 itself a prohibition to engage in conduct intended to avoid the
12 Treasury Department from imposing restrictions and prohibitions
13 on the bank.

14 THE COURT: Mr. Lockard, it would be better if you
15 used the podium, I'm told, or spoke into the microphone so
16 everybody could hear.

17 MR. LOCKARD: I think the mike at the podium might be
18 slightly taller.

19 THE COURT: I think you should start again. People
20 may not have been able to through the interpreters hear
21 everything. So it would be worth you starting over.

22 MR. LOCKARD: Sure, your Honor. I can't promise I'll
23 use the exact words, but hopefully I'll use some of them.

24 THE COURT: Well, I hope you say the same thing.

25 MR. LOCKARD: So, as I was saying, the argument that

HBGQATIC

1 Mr. Rocco advanced, I heard two basic arguments. One is about
2 the nature of the sanctions and specifically the operation of
3 the secondary sanctions. And the second argument being about
4 the nature of the charged conspiracy, which Mr. Rocco described
5 as encompassing two schemes, one of which occurred entirely
6 abroad. So I will address each of those two arguments in turn.

7 As I was saying, the charge that Mr. Rocco is arguing
8 against is not the charge that's actually contained in the
9 indictment. The indictment does not allege that it is a
10 criminal violation to engage in conduct that could expose
11 somebody to secondary sanctions.

12 What the indictment charges is it is a criminal
13 offense to engage in a prohibited transaction, which is what
14 the terms of the relevant orders and regulations say:
15 Transactions intended to avoid the imposition of prohibitions
16 under those sanctions. And so the indictment in great factual
17 richness, much more than is required for purposes of a motion
18 to dismiss an indictment, describes conduct undertaken by
19 Mr. Atilla and co-conspirators to engage in conduct that would
20 trigger the imposition of sanctions and those associated
21 prohibitions and to do so through transactions designed to
22 avoid the imposition of those sanctions.

23 And so in every way and under the letter of the
24 regulations and the IEEPA as they're written, that is a
25 violation of a prohibition that triggers the application of

HBGQATIC

1 1705. There's more that could be said on that topic, but I
2 think that is enough to be said on that topic.

3 With respect to the second argument about the nature
4 of the alleged conspiracy, the charged conspiracy is one
5 conspiracy. It is a conspiracy whose ultimate goal is to allow
6 Iran, a nation under heavy economic sanctions, especially at
7 the time of the charged offense, to allow Iran to have
8 virtually unfettered access to funds that otherwise would be
9 highly restricted. And the indictment, again, in much more
10 factual richness than is required for motion to dismiss
11 purposes, describes various ways in which Mr. Atilla and his
12 co-conspirators attempted to give Iran that access, one of
13 which took place entirely abroad and all of which involved both
14 deceptive conduct and misrepresentations directed to U.S.
15 Government officials, all of which involved Mr. Atilla's
16 employer, its attempts to maintain its access to property and
17 bank accounts in the United States despite the co-conspirators'
18 conduct, and it involved the purpose of allowing funds to be
19 freed up to be used in international financial transactions
20 anywhere in the world, including through U.S. banks, and in
21 fact resulted in the movement of substantial funds through U.S.
22 banks.

23 So no aspect of the scheme occurred entirely abroad,
24 and all of it was focused on and directed at attempts to
25 violate and avoid U.S. sanctions, to deceive U.S. banks and

1 HBGQATIC

2 U.S. regulators and to allow funds to be moved through U.S.
3 banks.

4 THE COURT: That otherwise would have been blocked.

5 MR. LOCKARD: That's exactly right.

6 THE COURT: So I am going to refer to some arguments
7 that are -- specifically, they are arguments that are presented
8 or have been presented by counsel. I may not specifically
9 refer to in this ruling. I'm aware of them and incorporated
10 them into my analysis, and it does not change the outcome that
I am about to describe.

11 By way of very brief background, on September 6, 2017,
12 Mr. Atilla was charged, along with eight other
13 co-defendants/co-conspirators including Reza Zarrab, Mehmet
14 Zafer Caglayan, Suleyman Aslan, Levent Balklan, Abdullah
15 Happani, Mohammad Zarrab, Camelia Jamshidy and Hossein
16 Najafzadeh. So they had been charged together in all counts of
17 a six count superseding indictment, we're referring to it as
18 (S4). It's a 52-page document, and they are charged with the
19 following crimes:

20 One is a conspiracy to defraud the United States in
21 violation of 18 United States Code, Section 371. That is Count
22 One, also referred to at times as the Klein conspiracy.

23 They are also charged in Count Two with conspiracy to
24 violate the International Emergency Economic Powers Act, herein
25 referred to and has been referred to this morning as IEEPA.

1 HBGQATIC

2 That's 50 United States Code, Sections 1701 through 1707, and
3 the Iranian Transactions and Sanctions Regulations, sometimes
4 referred to as ITSR, 31 C.F.R. Parts 560 and 561.

5 And, third, they are charged with bank fraud in
6 violation of 18 United States Code, Sections 1344 and 2. That
7 is Count Three.

8 Fourth, in Count Four they are charged with conspiracy
9 to commit bank fraud in violation of 18 United States Code,
10 Sections 1344 and 1349.

11 And fifth, they are charged with money laundering in
12 violation of 18 United States Code, Sections 1956(a)(2)(A) and
13 2. That's Count Five.

14 And finally in Count Six, they are charged with
15 conspiracy to commit money laundering in violation of 18 United
16 States Code, Sections 1956(a)(2)(A) and 1956(h).

17 Those are the six charges which are lodged against all
18 of defendants, including Mr. Atilla.

19 So when I summarize, again, the motion to dismiss, it
20 may not include all of counsel's arguments specifically, but
they are all embraced in the ruling.

21 In summary, defense counsel argues, among other
22 things, that the charges against Mr. Atilla are based on
23 conduct entirely outside of the United States which had no
24 impact in the United States and cannot support a criminal
25 charge against him, and that the charges based on the use of

HBGQATIC

1 the United States financial institutions lack any factual
2 connection to Mr. Atilla; and even if there were such a factual
3 connection to him, he could not be prosecuted as a foreigner
4 for his foreign activity.

5 Another of defense counsel's arguments is that without
6 a basis for prosecuting Mr. Atilla under what is described in
7 the motion papers as the Sanctions Regime, the entire
8 indictment falls with the exception of the Klein conspiracy
9 charged in Count One. Absent a violation of the Sanctions
10 Regime the IEEPA counts, the bank fraud counts and the money
11 laundering counts, according to the defense, have no legal
12 basis and must be dismissed.

13 And with regard to the Klein conspiracy charged in
14 Count One, the defense argues that Mr. Atilla cannot be charged
15 with attempting to impair or impede a U.S. government function
16 if he did not know of, or had reason to foresee, such a
17 connection.

18 Additionally, defense notes that: "We are not saying
19 that the government cannot seek to prosecute under two
20 different statutes that both proscribe the same conduct.
21 Instead, we submit that where a more recent statute or
22 regulation specifically addresses but does not proscribe the
23 activity in question, the government cannot end run that
24 statute by resorting to a broader, older law."

25 Defense counsel states too that this "Court appears to

1 HBGQATIC

2 have concluded that IEEPA and ITSR can be applied to a foreign
3 national involved in conduct emanating from the United States
4 or property within the United States" but defense counsel
5 "respectfully suggests that the Court reached the wrong
conclusion."

6 The government responds -- this is a summary, but it
7 includes some quotes from the government's brief just as I have
8 quoted from the defense brief. The government counters that:
9 "The indictment clearly describes how the alleged conduct fits
10 together as one coherent conspiracy to remove Iranian oil
11 proceeds held at Halkbank, and to launder them so that the
12 connection between the funds and Iran was obscured, which
13 allowed the money to be used for, among other things,
14 transactions passing through U.S. banks that would otherwise
15 have been blocked."

16 According to the government, the whole point of these
17 transactions was to create a pool of laundered funds for Iran's
18 use; that is, "the conspiracy that Mr. Atilla is alleged to
19 have willfully joined, helped design and lied to U.S.
20 regulators about," these are all allegations, allegations that
21 must be presumed as true on a motion to dismiss.

22 And according to the government, as a member of the
23 conspiracy, Mr. Atilla is responsible for all of the acts
24 encompassed by the conspiracy, including the transactions
25 executed through U.S. banks even if he did not personally

HBGQATIC

1 participate in them.

2 So, as you are aware, in reviewing a motion to dismiss
3 an indictment, the Court must take the allegations of the
4 indictment as true. A cite for that is *United States v.*
5 *Hashmi*, 2009 WL 4042841, Southern District case from 2009. And
6 the decision as to whether to prosecute generally rests within
7 the broad discretion of the prosecutor. A prosecutor's
8 pretrial charging decision is presumed to be legitimate. This
9 cite is *United States v. Sanders*, 2011 F. 3d 711, a Second
10 Circuit decision of 2000. "A defendant who is charged with
11 being a participant in a conspiracy, even if he committed no
12 act within the United States, is subject to prosecution in this
13 country so long as one of the conspirators commits an overt act
14 in furtherance of that conspiracy within the territory of the
15 United States." This quote comes from a relatively recent case
16 called *United States v. Akova*, 2016 WL 7116127 (N.D Georgia
17 2016).

18 An indictment is said to be sufficient if it contains
19 the elements of the offenses charged and fairly informs a
20 defendant of the charges against which he must defend. This
21 cite is *United States v. Chalmers*, 474 F. Supp. 2d 555, a
22 Southern District case from 2007. It is also said that "an
23 indictment need do little more than to track the language of
24 the statute charged and state the time and place (in
25 approximate terms) of the alleged crime or crimes." That also is

1 HBGQATIC

2 from the *Chalmers* case 474 F. Supp. 2d 559.

3 The Court finds that the indictment here (S4) should
4 not be dismissed. Among other reasons, it contains all of the
5 elements of the offenses charged and fairly informs Mr. Atilla
6 of the charges against which he must defend. The indictment
7 tracks the statutory language of all of the offenses charged.
8 It describes in detail a "multi-year scheme to violate and
9 evade U.S. are national security controls against the
government of Iran."

10 The indictment also explains, among other things, that
11 "the leaders of a Turkish bank majority owned by the Government
12 of Turkey," which is a reference to Halkbank, "knowingly
13 facilitated the scheme, participated in the design of
14 fraudulent transactions intended to deceive U.S. regulators and
15 foreign banks, and lied to U.S. regulators about HalkBank's
16 involvement." That's a quote from (S4) at paragraph three.

17 The Court further finds that the defendant has had
18 more than adequate notice of the nature of the charges pending
19 against him, including, among other things, from the
20 indictment, the earlier complaint and from discovery. The cite
21 is *United States v. Wolf*, 2003 WL 2359107. In that case, the
22 Court denied a motion to dismiss to dismiss the indictment and
23 a motion for a bill of particulars where the indictment "mostly
24 tracked the language of the relevant statutes" and the "alleged
25 fraud" -- this is a different case -- "the alleged fraud in

HBGQATIC

1 that case is spelled out in far greater detail in the criminal
2 complaint to which the defense has access."

3 The Court also notes that in Mr. Atilla's motion for
4 bail dated July 28, 2017, the defense argued, among other
5 things, that the criminal charges against Mr. Atilla, which at
6 that time were two counts, a conspiracy to violate IEEPA and
7 ITSR and a conspiracy to commit bank fraud, are eminently
8 defensible. This is what was stated by defense counsel in the
9 bail application. This is defense counsel's point of view.
10 Indeed, the information which has been provided in discovery
11 suggests that the case against him, Mr. Atilla, is tenuous at
12 best. The charges apparently are predicated on a series of
13 transactions involving a number of Reza Zarrab's companies and
14 Halkbank in 2013, which are described in the complaint leading
15 to Mr. Atilla's arrest. The transactions took place between
16 Dubai, Iran and Turkey, and involved sales of gold and food
17 between Turkish and Iranian entities for which Halkbank served
18 as the settling bank. This is all from the submission from the
19 defense with respect to bail.

20 Mr. Atilla, a senior manager at the bank, is allegedly
21 connected to these transactions through a small number of brief
22 recorded Turkish telephone conversations in which various
23 transaction documents relating to the sale of food are
24 discussed by people identified on transcripts as Mr. Atilla and
25 Mr. Zarrab, among others. It seems to be the government's

1 HBGQATIC

2 theory that those transactions involve forged or somehow
3 falsified documents and the sales of foodstuff were bogus.

4 Defense counsel further argues that the notion that
5 Mr. Atilla was linked to the U.S. transactions is against the
6 overwhelming evidence and allegations in this case, for none of
the Halkbank food or gold transactions were dollar-based.

7 This is now me speaking, not the defense. The Court's
8 prior jurisdictional analysis regarding defendant Zarrab and
9 other alleged co-conspirators and prior indictments applies to
10 Mr. Atilla. The indictment alleges that Mr. Atilla, Mr. Zarrab
11 and others were co-conspirators. The indictment is -- well, I
12 will refer you to my earlier decision and order dated
13 October 17, 2016 in which the motion there, Mr. Zarrab's
14 motion, was denied.

15 The indictment here alleges a domestic nexus between
16 the defendant and his co-conspirators' conduct and the United
17 States, i.e., the exportation of services from the United
18 States. These also are set forth in the decision and order
19 dated October 17, 2016. And it is of no legal moment that
20 defendant Atilla is not named in an overt act in paragraphs 56
21 through 84.

22 The Second Circuit Court of Appeals has made it
23 abundantly clear that the execution of money transfers from the
24 United States to Iran on behalf of another, whether or not
25 performed for a fee, constitutes the exportation of a service

HBGQATIC

1 and may be in violation of IEEPA and ITSR. The cite is *United
2 States v. Banki*, 685 F. 3d 99 a Second Circuit decision from
3 2012.

4 Similarly, in *United States v. Homa International
5 Trading Corp.* where defendant was convicted of violating the
6 IEEPA and the ITSR by "planning and implementing the transfer
7 of funds from the United States to bank accounts in Iran via
8 Dubai and the UAE," in that case, the Second Circuit rejected
9 defendant's argument on appeal following conviction that there
10 was insufficient evidence to demonstrate that his money
11 transfer services were services prohibited by embargo
12 regulations. This is a quote from the Second Circuit decision:
13 "In our view, the execution on behalf of others of money
14 transfers from the United States to Iran is a 'service' under
15 the terms of the Embargo." The Second Circuit also held that
16 "the Embargo's prohibition on the exportation of services
17 applies where the benefit of such services is received in Iran,
18 if such services were performed in the United States." I refer
19 you also to *United States v. Saboonchi*, 214 WL 1831149 case
20 from Maryland in 2014 where the Court stated that the "embargo
21 to include all exportation and re-exportation, direct and
22 indirect, with the specific destination of Iran...is a simple,
23 unambiguous bar...of all exportation to Iran."

24 The Court finds that the indictment here, the (S4),
25 reflects the elements of each count in the indictment and

HBGQATIC

1 establishes a sufficient nexus between Mr. Atilla and his
2 co-conspirators' conduct and the United States. And,
3 therefore, the question of whether the IEEPA and the ITSR,
4 whether they apply extraterritorially, need not be reached. In
5 *United States v. Mostafa*, the district court here -- not me,
6 but another judge here -- held "There is a sufficient domestic
7 nexus between the allegations...to avoid the question of
8 extraterritorial application altogether. Overt acts occurred
9 in the United States."

10 More recently -- I referred to this case earlier from
11 *United States v. Akova*, that court in Georgia observed the
12 following: The judge says, "I readily conclude that Congress
13 intended for the IEEPA to apply extraterritorially...
14 Likewise, the ITR [Iranian Transactions Regulations] broadly
15 prohibits anyone, directly or indirectly, from engaging in or
16 facilitating trade between the United States and Iran,
17 including through third countries."

18 The Court goes on to say that: "It would be illogical
19 to conclude that Congress intended only to prohibit individuals
20 on U.S. soil or U.S. citizens abroad from trading with Iran,
21 but allow foreign persons to export goods from the U.S. to
22 trade with Iran and harm the national security interests of the
23 United States." Again, the cite is *United States v. Akova*,
24 2016 WL 7118273 (N.D Georgia).

25 In conclusion, the dismissal of an indictment is an

HBGQATIC

extraordinary remedy reserved only for extremely limited circumstances implicating fundamental rights, and it is my judgment that such circumstances are not present here. The cite is *United States v. De La Pava*, 268 F. 3d 157 (2d Cir. 2001).

Consequently, the motion to dismiss is respectfully denied.

The motion to dismiss, as you all are probably aware, also had an alternative branch to it relating to severance, and that alternative branch is similarly denied.

Mr. Atilla is charged with participating in the same conspiracies as eight other defendants, i.e., at its core, circumventing U.S. sanctions against Iran via Halkbank. A non-frivolous conspiracy charge is sufficient to support joinder of defendants under F.R.Cr.P. 8(b), and the fact that evidence may be admissible against one defendant but not against others does not require separate trials, nor in my judgment is there any basis to strike portions of the indictment. The cite is *United States v. Tomero*, 496 F. Supp. 2d 253. Counsel for Mr. Atilla may renew its applications before such time as the indictment is submitted to the jury should Mr. Atilla ultimately be found guilty.

So that is the ruling. We will take a short break if you'd like -- I would, in any event, like a minute or two -- and then turn our attention to the motions in limine

HBGQATIC

1 Is that all right with you?

2 MR. LOCKARD: Yes, your Honor.

3 MR. ROCCO: Thank you, Judge.

4 (Recess)

5 THE COURT: So I am not going to be able in ultimate
6 detail to resolve all the motions in limine at this time. I
7 think I will give you a fair heads up of where I'm heading with
8 respect to each of them.

9 But what I do plan to do is have a further conference
10 on Tuesday at 2:00. So for that conference, I'm going to need
11 some more detail. Also, it's my experience that as we get
12 closer to trial, people sometimes slim down their cases, so
13 there may not be as many experts as names are currently
14 floating around and, indeed, there may not be as many fact
15 witnesses as names are floating around. I don't need to go
16 into all these names, I don't think, at this time and I hope
17 actually that there is some slimming down that occurs before
18 Tuesday.

19 In that connection, we are still looking today for a
20 list of names and places. We need that for the voir dire.

21 Let me first give you some general outline rulings.

22 First, there is a motion in limine by the defense to
23 preclude recordings from Turkey, I think this is for the 2013
24 period proceedings.

25 Before I get to that, is it the government's intention

HBGQATIC

1 to play the recordings? I think the answer is yes, but also to
2 have transcripts. Are there any situations where there are
3 just transcripts and no recordings, for example?

4 MR. LOCKARD: So I think the actual playing of
5 recordings is likely to be limited since they are in Turkish,
6 but we will have transcripts and translations prepared of any
7 recording that we would offer.

8 I think the answer is with respect to calls for which
9 there is no audio to produce, we will not be offering
10 transcripts or translations, although those documents may exist
11 as a tool to refresh recollection or as a past recollection
12 recorded but not be offered.

13 THE COURT: All right. So the fundamental issue here
14 is -- and the transcripts and also, for that matter, recordings
15 would certainly be admissible if the government were able to
16 authenticate the recordings and/or the transcripts and if they
17 are relevant. They would be admissible, so the motion to
18 preclude them is denied, assuming the authentication, etc. is
19 demonstrated. I think that's one of the things we can talk
20 about on Tuesday or at least preview on Tuesday afternoon.

21 As to co-conspirator statements, the rules are pretty
22 clear about what needs to be demonstrated beforehand; that
23 there is a conspiracy, for example, that the members included
24 the declarant and the party against whom the statement is
25 offered, and that the statement was made during the course and

HBGQATIC

1 in furtherance of the conspiracy. That is from the *Bourjaily*
2 *v. United States*, 483 U.S. 171 (1987).

3 Experts: So experts, generally speaking, are welcome.
4 Too many are not as welcome as fewer. I am hoping that there
5 is a slimming down in the expert pool between now and Tuesday
6 so that we can move things along and avoid overlap.

7 I didn't see anything in the submissions of either
8 party that would require a particular hearing with respect to
9 the experts. So the experts, you have to show that they are
10 expert and what their expertise is and how that will help the
11 jury understand and decide the case.

12 So each side go through the list. I think the defense
13 has two experts. I don't know if there are more. The
14 government had more than two. Let's figure out on Tuesday how
15 many are left, and we will see where that gets us.

16 There is a motion to preclude -- this relates to
17 Mr. Zarrab -- the letter using the phrase "economic jihad" and
18 maybe other letters as well. And the government in response to
19 the defense motion to preclude points out that these letters,
20 one is signed by Mr. Zarrab apparently and to Amadinejad, and
21 the other is a draft to the general manager of the Central Bank
22 of Iran. They are not directly connected to Mr. Atilla, but
23 the government argues that they should be admissible as
24 statements made by Mr. Zarrab in furtherance of the conspiracy
25 and his background. These letters are referenced in the

HBGQATIC

1 indictment at paragraphs 24(A) and (B).

2 Where are they in the exhibit binders? What would be
3 a handy way to find them in the exhibit binders as opposed to
4 going through all of the binders?

5 MR. LOCKARD: I don't have that proposed exhibit
6 number handy, but we will --

7 THE COURT: Could you get that and tell us about that.

8 MR. LOCKARD: We will.

9 THE COURT: Earlier in my career on the bench I had a
10 trial, an economic trial, in which the government in its
11 diligence I think produced 14 binders for each juror, those
12 black thick binders. So as things eventuated, there was a
13 stack next to each juror of those 14 binders making it almost
14 impossible on a regular basis to see the juror. But more than
15 that, the nature of the examination was -- and this is
16 serious -- the nature of the examination was if the jurors
17 would open their binder one to Exhibit 17, for example, and
18 open binder seven to Exhibit 14 and compare them. That was the
19 testimony. It was a sight to behold. I would argue or
20 caution -- I won't argue, but I would caution against similar
21 practice here. So the binders should be helpful, not,
22 obviously, impediment.

23 So those letters, I agree that from what I know about
24 them, and I will take a look at them again when you let me know
25 where they are in the exhibits, but I think that the motion to

HBGQATIC

1 preclude is denied and counsel should discuss, both defense and
2 the government, whether some instruction is appropriate that
3 reflects that Mr. Atilla is certainly not charged with a
4 terrorism offense or participating in that in any way so you
5 can work out, I think, an appropriate stipulation relating to
6 those letters.

7 So the government has a motion in limine to admit
8 co-conspirator statements, and the rules, as I said before, are
9 pretty clear when a co-conspirator statement can come in and
10 whether those criteria are met. I think that's all I need to
11 say about that now. If you have any disputes or specifics, we
12 will discuss them Tuesday afternoon. The idea for me is to
13 clear away these discussions on Tuesday so that we don't slow
14 down the trial with sidebars or hearings within a hearing, as
15 it were.

16 So what I said before about experts also applies to
17 the defense experts. It is a little unclear to me how one of
18 the defense experts; that is to say, who is an expert in
19 linguistics and the Turkish culture, how that person would have
20 expertise to cover all the topics that defense counsel is
21 suggesting. I could see, for example, how it would be helpful
22 if that person knows that there's a discussion here, that that
23 person might talk about the conflict between the Erdogan and
24 the Gülen-ist movement in Turkey as it might impact the case.
25 If someone were expert on that, that probably would be all

HBGQATIC

1 right.

2 If the person could say whether the recordings, if
3 they are admitted, or the transcripts, the meaning of certain
4 words and phrases, how that might differ if that person knew
5 from American use of similar terms, that would probably be OK.

6 Also, as to the meaning of certain words and phrases,
7 they would be admissible it seems to me if they illuminate
8 helpful context or Turkish intonation, for example.

9 A little less easy for me to see how a person could
10 talk about the relationship between parties participating in
11 the phone calls as to whether it were very close, friendly or
12 etc. That would be a bit of a stretch for a person who is not
13 one of the people in that phone call to be able to be helpful
14 about it. Similarly, although there may be something to be
15 said by such an expert if the person really were expert in this
16 matter generally of the relationship between individuals at
17 work.

18 So I'm not ruling on all the categories, but you
19 really do have to stick to the person's expertise and be able
20 to demonstrate in advance how that expertise applies to a
21 particular -- otherwise, there are likely to be objections
22 during the course of the testimony which happens. It would be
23 better for it not to happen, so maybe counsel could meet and
24 confer in advance about who is going to testify to what and see
25 if you can't have agreement.

HBGQATIC

1 You were also, I think, talking, somebody was, in the
2 motions back and forth about the possibility of stipulations is
3 always a helpful technique if the parties can agree. Sometimes
4 you can't, you are unable to avoid calling that person, and it
5 may be preferable to have the person than to have a stipulation
6 of testimony, but I think both sides here need to have, if you
7 haven't already, a good meet and confer about all of these
8 issues and see how you can come to agreement if you can, so we
9 only need to discuss the issues as to which there's
10 disagreement.

11 So there's this issue, the government talked about
12 precluding evidence that defendants were acting under the
13 public authority of a foreign government. I'm not sure exactly
14 whether there's going to be such testimony. That's something
15 you should meet and confer about and see if that remains to be
16 an issue that we even need to discuss.

17 There's also a government motion to preclude evidence
18 with respect to bank fraud offenses on the basis of what is
19 referred to as purported victim fault. I don't know if that is
20 something that is theoretical or not so you could talk about
21 that before Tuesday and let me know if there is still something
22 to discuss.

23 The government sought to preclude evidence that
24 Mr. Atilla was not arrested or charged in a corruption
25 investigation in Turkey. I don't have any problem with that

HBGQATIC

1 being brought out. It's true. As far as I know, he was not
2 implicated in that so I think he should be able to say that.

3 There were other issues relating to something called a
4 Joint Comprehensive Plan of Action and also certain donors to
5 something called The Foundation For Defense Democracy. I don't
6 know if these are really live issues or will be. So if they
7 aren't, let me know on Tuesday; and if they are, tell me what
8 the remaining issues are.

9 I think those are the highlights of the motions in
10 limine. I really would like to get it refined to serious
11 concrete debate or dispute, rather, if there is any, if it
12 isn't resolved before Tuesday. Hopefully it will be.

13 That's really it for me. Does anybody else want to
14 add anything?

15 MS. FLEMING: Yes, your Honor, we do.

16 We've made some *Touhy* requests from the government.
17 We have not heard back from them. We're getting awfully close
18 to trial. We have trial subpoenas prepared, and we would like
19 to submit them to the Court. We just have not heard back.
20 They went out -- the *Touhy* letters went out November 1.

21 THE COURT: Well, maybe after -- well, now or after,
22 you know, we break up, you can work these things out. You're
23 welcome to stay in the courtroom.

24 MS. FLEMING: The problem is some of these people
25 don't work for the government any more, so we need to give them

HBGQATIC

1 heads up. We tried to comply with the regulations, but we are
2 getting awfully close to the trial, and it's Thanksgiving, so
3 we really would like to get the subpoenas out.

4 THE COURT: I agree with that.

5 MS. FLEMING: By the way, we did preserve in our
6 letter the right to argue that the only circuit that has said
7 so far that the *Touhy* regulations are unconstitutional is the
8 Ninth Circuit, so we have preserved that issue in our letter,
9 and I would like to preserve that on the record.

10 THE COURT: Yes, I think that's something you should
11 be able to work out.

12 Anything else?

13 MS. FLEMING: Judge, we have a number of other issues.
14 The Court precluded us from giving any more
15 submissions and the government, I guess, asked permission --

16 THE COURT: I was actually doing that as a favor to
17 all of you. I thought you had enough with the submissions, so
18 I was trying to be helpful.

19 MS. FLEMING: Unfortunately, things come up that we do
20 need to bother the Court with if we can't work them out with
21 the government. They're lovely guys, but we have not been able
22 to work a lot out with the government. We see things very
23 differently on lots of issues.

24 But one of the things is that your Honor entered a
25 protective order with regard to the Jencks Act materials. We

HBGQATIC

1 still don't have them. The government has tied it to they are
2 not going to give us Jencks Act material unless we stipulate
3 certain evidence coming into evidence, which putting aside how
4 incredibly offensive that is that they would try to extort
5 stipulations on evidence to get something that is Jencks Act.
6 And it is the practices of the Court in saving judicial economy
7 require early to help people prepare for trial so we're not
8 interrupting the trial after somebody has testified on direct
9 examination.

10 There are reasons we may not want to stipulate to all
11 of these records. I think it is grossly unfair that it would
12 be tied to the two. You've entered the protective order, and
13 we would ask that you require that the government produce the
14 Jencks materials.

15 That would include a witness list. We have been
16 operating in a vacuum here. As you can tell from our motions
17 in limine, we still don't know how they're going to
18 authenticate or attempt to authenticate these recordings. I
19 won't go into a lot of it because some of it is covered under
20 the protective order, but we are really operating in a vacuum
21 less than a week before we are picking a jury in a trial.

22 THE COURT: Do you want to do one by one and hear from
23 them as to each one?

24 MR. LOCKARD: Thank you, your Honor.

25 Before that, I will quickly identify two proposed

HBGQATIC

1 exhibit numbers for the Court. The first is Government Exhibit
2 901, and 901-T is the translation.

3 THE COURT: Is this the letter?

4 MR. LOCKARD: Yes, your Honor.

5 THE COURT: The economic jihad letter?

6 MR. LOCKARD: Yes, your Honor. And also proposed
7 Government Exhibit 4539 and the corresponding dash T exhibit.

8 Very quickly with respect to the *Touhy* issue, defense
9 counsel did copy us on *Touhy* requests that they submitted to
10 Main Justice and to Treasury. We noticed that they were not
11 directed to the correct component and directed them to the
12 correct people so that they could be considered and acted upon
13 and have been encouraging a prompt response, and we will
14 continue to do so.

15 With respect to the --

16 THE COURT: You redirected them, as it were?

17 MR. LOCKARD: Yes, your Honor, to make sure that they
18 got to the right desk as quickly as possible.

19 With respect to the production of 3500 material, I
20 think that that has been cast in an inaccurate light.

21 So we did say, as we said I think at the last
22 conference on the record, that we were prepared to produce 3500
23 material on Monday if we also got certain stipulations that
24 would facilitate that production and would allow us to devote
25 trial prep resources to preparing the material well in advance

HBGQATIC

1 of trial.

2 We got agreement on zero stipulations so far. Applied
3 for a protective order on Tuesday. It was entered yesterday,
4 and we expect to begin producing 3500 material today after the
5 conference, which I think addresses both that issue as well
6 as --

7 THE COURT: Your point is now that I've signed a
8 protective order, that facilitates your dissemination of 3500
9 material.

10 MR. LOCKARD: Exactly, your Honor.

11 And the reason why those two issues are tied is
12 because both the production of 3500 material and trial
13 preparation both require resources. Stipulations help to
14 streamline both trial and trial prep and allows to devote
15 resources to early disclosure on other matters. But
16 nonetheless, we are where we are and we are going to begin
17 producing it today.

18 That should also address, I think, the questions
19 concerning a witness list, although I will note that there has
20 been substantial notice about likely witnesses in this trial,
21 and that has been the subject of some of the motions in limine
22 so there is not a vacuum. There's actually been a substantial
23 amount of identification of likely witnesses to date.

24 MS. FLEMING: Judge, on the stipulations, they gave us
25 three. One of them is for bank records. I don't think we even

HBGQATIC

1 have the bank records yet, so it's hard to stipulate when we
2 haven't seen the exhibits yet to certain exhibits, and again,
3 we will deal with it.

4 On the protective order, we did not submit anything in
5 reply. We were mindful of the Court's order not to submit
6 anything, and we have the same juggling act getting ready for
7 trial as the government does. But in 3500 there is a mechanism
8 for dealing with sensitive material. It is the Jencks Act, and
9 the government, I respectfully suggest, did not follow what the
10 proper way to do it is. The 3500 in the statute gives away to
11 redact certain materials and provides how you do it and how you
12 preserve the materials in the event of an appeal down the road.
13 And we think that would have been the better road to go in
14 terms of this protective order.

15 The protective order -- we have a client that we need
16 to share materials with. We're dealing with it under, as you
17 know, we complained about it probably ad nauseam to the Court
18 this May, but we're dealing with going to the MCC a lot and
19 trying to work with him there. He does a lot of work on his
20 own at night to be prepared for us the next day.

21 And I know the government probably is not accepting
22 this but we are sensitive to the issues related to any kind of
23 witness issues. We are sensitive to it on both sides, and I
24 think that we would probably be very willing to deal with any
25 of those issues, but to have a protective order that prohibits

HBGQATIC

1 and inhibits us to do things with our client I think is more
2 difficult. So I think the proper method should have been to
3 follow what the 18 U.S.C. 3500 said should be done.

4 In terms of our Rule 15 depositions --

5 THE COURT: Yes. Where are we at?

6 MS. FLEMING: -- we received the Court's order, and we
7 spoke with the government, and we started to put all the
8 logistics in place to get this all done, and the government
9 emailed to us that they are now talking to their folks at the
10 Office of International Affairs (OIA) and they need to get back
11 to us on whether in fact they can do the depositions or not.

12 They suggested November 20 and 21 because there are
13 multiple counsel. We will try to work dates out with them. I
14 don't think those are good dates. Those are jury selection
15 dates, and the Court just set a conference those dates, and,
16 frankly, I think both counsel should be here for those
17 important things. I think the defendant should be able to be
18 at both of them if he can be at both of those events.

19 But we are now in a little bit of a holding pattern,
20 and I'm not blaming the team from the United States Attorney's
21 Office, but it appears to us that because of whatever is going
22 on with the Office of International Affairs that we are simply
23 going to run out of time or are not going to be able to do
24 these depositions after we worked pretty hard to get an order.

25 And I don't know what the status of that is or they

HBGQATIC

1 know it. We are trying to put plan B into effect, which is
2 basically begging and groveling these witnesses if they are
3 given safe passage to come to the United States. As you could
4 see from our submission, we think they are pretty key witnesses
5 for our client's defense.

6 I am the one who spoke with them directly, among other
7 people. They were really very, very reluctant and did not want
8 to come to the United States. Happy to testify via live video
9 feed or in depositions. If we have to go to plan B, we will do
10 whatever we can, but I am not in the least bit comfortable that
11 we are going to be able to convince anybody even with safe
12 passage. I think we may need the Court's help in at least
13 getting OIA to give an answer to the U.S. Attorney's Office.

14 And, secondly, when we asked for safe passage for the
15 four witnesses we've identified there, they told us we have to
16 know whether they are willing to come here. It's sort of the
17 chicken and egg. The answers we get back from people who are
18 in Turkey who are helping us with logistics ask, well, how do I
19 get people to go if I can't tell them they have safe passage.
20 So we're asking the Court's help on this dilemma.

21 THE COURT: We're happy to help you in any way we can.
22 Frankly, I was assuming or thinking those Rule 15 depositions
23 were done by now.

24 MS. FLEMING: They should have been.

25 THE COURT: This was some time ago that I signed that

HBGQATIC

1 order, but --

2 MR. LOCKARD: Your Honor, I can add a little bit to
3 the record. Really, the issue with the Rule 15 depositions is
4 the fact that a motion was made on the eve of trial. This is a
5 process that is not a fast one. And even when there are
6 individuals who are willing to voluntarily testify, it still is
7 not a fast one. I can provide a little bit of additional
8 information about that.

9 THE COURT: No, I understand. I understand. And it
10 did come up somewhat late, but it's a condensed period of time
11 that we were dealing with.

12 MR. LOCKARD: There's a significant issue that I think
13 we've referred it to, but I think it would be helpful to lay it
14 out a little more fully in this context, which is that -- so
15 there is a long history of experience with the Department of
16 Justice in conducting Rule 15 depositions in voluntary and in
17 voluntary situations by video conference and in person.

18 What we have been advised by the component of the
19 Department of Justice that coordinates these issues is that
20 typically even in video conference depositions, even in
21 voluntary depositions, host country authorization typically
22 still is required in the form of letters rogatory. And in fact
23 some jurisdictions consider it a potential criminal offense for
24 foreign government officials to take sworn testimony of a
25 national in their country. So it is a significant issue of

HBGQATIC

1 international relations and a significant issue for the people
2 who would potentially be participating in those depositions.

3 So it is our understanding that the Office of
4 International Affairs has contacted the Turkish Ministry of
5 Justice to advise them of the contours of the proposed
6 depositions and to seek a formal position, and we don't have it
7 yet. Until we have it, we can't do it.

8 So that is the issue. It's not an issue of government
9 slowness or recalcitrance. It's an issue of the lateness of
10 the request and the types of things that have to be done to
11 make them happen.

12 In terms of the safe passage issue, it's a very
13 abstract issue. No one actually has asked the government to
14 consider safe passage. It's been asked hypothetically is this
15 something we would be prepared to grant, but no witness to our
16 knowledge has asked for it. And if it is asked, then there's a
17 process for considering it, but it can't happen until it's
18 requested.

19 THE COURT: When you say "asked," you mean some form
20 or some application or some affidavit or --

21 MR. LOCKARD: Or just a request.

22 THE COURT: Or a request by counsel?

23 MR. LOCKARD: It's a hypothetical.

24 THE COURT: By counsel?

25 MR. LOCKARD: By counsel.

HBGQATIC

1 MR. ROCCO: If I may address this, your Honor. I'd
2 like to give this a little color. I asked Mr. Lockard twice
3 for safe passage, and I was told once at least after the
4 witnesses were identified --

5 THE COURT: Just so it's clear, it means that they can
6 come with assurance that they can leave after they testify.

7 MR. ROCCO: And not be arrested.

8 THE COURT: And not be arrested.

9 MR. ROCCO: Yes, that they have safe passage in and
10 out of the country.

11 Ms. Fleming in her interviews in September, I believe,
12 raised that issue with four or five of the witnesses, and they
13 were adamant that they did not want to come to the United
14 States.

15 THE COURT: That they would not come.

16 MR. ROCCO: They would not come.

17 THE COURT: That was my understanding when we talked
18 about the video depositions that this would be helpful to you
19 because they were not going to come.

20 MR. ROCCO: They refused, your Honor. Last week when
21 your Honor was reluctant to even take the Rule 15 motion --

22 THE COURT: Well, I not only took it, but I granted
23 it.

24 MR. ROCCO: You did and you gave us time to do the
25 depositions, but I asked Mr. Lockard as a fallback would the

HBGQATIC

1 government agree to give any of these people safe passage, and
2 at that point we had identified four of our witnesses, and we
3 were talking specifically about four of our witnesses. And
4 when Ms. Fleming says it's a chicken-and-egg thing, it's a
5 little bit like the Paris peace negotiations during the Viet
6 Nam War -- if I may finish this thought, Judge.

7 THE COURT: Yes.

8 MR. ROCCO: We've identified the people. It is
9 difficult for us to go back and say, "Well, if you say you're
10 coming to the United States, the government will then consider
11 offering you safe passage." It is much more of an inducement
12 to a prospective witness who is traveling from abroad to the
13 United States to say "The government told us that you will have
14 safe passage and we are in the process of arranging that."

15 In terms of what happened with the foreign
16 depositions --

17 THE COURT: Wait. Wait. Wait. Before you get to
18 that, so my understanding at the time you submitted the
19 application to me was these were helpful to the defense, but
20 they were, as you said before today, adamantly refusing and
21 they would not come to the United States. So I thought that
22 was the remaining option was to take their deposition by video,
23 etc. So that can't happen or now are they willing to come?

24 MR. ROCCO: Your Honor, I cannot tell you that they're
25 willing to come. We have approached them. We have approached

HBGQATIC

1 them again through an intermediary to see if they would
2 entertain coming if the government offered them safe passage.
3 What the government is saying, I understand Mr. Lockard's
4 comments last week when we spoke, this is on the 6th, is that
5 the government does not want to entertain these requests in a
6 vacuum. So in other words, people are going to have to commit
7 to come to the United States before the government would
8 undertake a process, and only God knows how long that will
9 take, and only God knows whether the government will be
10 prepared to give any of these four witnesses safe passage. So
11 in terms of --

12 THE COURT: I have no experience in that field, but
13 this is an off-the-cuff, it sounds like. You can't get a
14 decision like that this afternoon.

15 MR. ROCCO: Well, I don't, quite frankly, think it
16 should take all that long, your Honor, but I think it would be
17 certainly well for us to know so we can go to our witnesses and
18 say "the government is prepared to give you safe passage" so
19 they can make arrangements to come to the United States.

20 THE COURT: Why not just do those video depositions
21 and put them in the bank anyway. I'm surprised to hear that
22 they are not done.

23 MR. ROCCO: Your Honor, it's because the government --
24 and we are not questioning the government. We are not
25 questioning the Office of International Affairs. Essentially,

HBGQATIC

1 the Office of International Affairs is saying that personnel at
2 the Department of Justice cannot participate in foreign
3 depositions without permission of the foreign country, and that
4 makes sense to me and it's logical.

5 We had been advised, because we have liaison
6 correspondent counsel in Turkey, that the Turkish government
7 did not care; that we could go forward with these depositions
8 provided that we were not using compulsory process in Turkey.

9 So if depositions were conducted voluntarily -- this
10 is based on conversations that this lawyer had with people in
11 the Ministry of Justice, we were set to go. I'm not faulting
12 the government for this at all. Ms. Fleming was not faulting
13 the government for this at all. We are where we are, and what
14 we are trying to do now is if we can do it before trial, get
15 these depositions done. If we can't, then what we're trying to
16 do is get these witnesses here. I think what Ms. Fleming was
17 asking, is there any way that the Court can help us get safe
18 passage.

19 THE COURT: I don't know is the answer. I've never
20 been in that -- I would be surprised if it was -- I shouldn't
21 say I would be surprised. I just don't know what's entailed
22 and what the Court's role in that process could or should be.
23 I have no idea.

24 MR. ROCCO: We can brief that, your Honor, if your
25 Honor would lift the moratorium on filings to allow us to do

HBGQATIC

1 it.

2 MR. LOCKARD: I think the fundamental factual problem
3 is that what we have been told is that these witnesses have
4 advised defense counsel that even if they had it, they still
5 wouldn't come.

6 THE COURT: That's what I understood.

7 MR. LOCKARD: So the request is will you give it
8 anyway and see if that changes their mind? And the answer is
9 Mr. Atilla's counsel does not represent these witnesses. These
10 witnesses are their own people. If they want to request safe
11 passage, we will consider it, but under the circumstances that
12 we have right now, nobody is asking for it. In fact, they said
13 "even if you gave it, we wouldn't come." Under those
14 circumstances this seems like a very moot conversation.

15 THE COURT: How easy, Mr. Lockard, or soon do you
16 think this issue about the video depositions -- for example,
17 what Mr. Rocco just said, somebody said that as long as it's
18 not compulsory that the government of Turkey wouldn't care or,
19 you know, wouldn't -- I don't know what the word is. I thought
20 that sounded like a fruitful avenue for them to present
21 testimony on behalf of Mr. Atilla, which they should be able to
22 do.

23 MR. LOCKARD: As I said, the request has been passed
24 to the correct component of the foreign government that handles
25 issues and is authorized to make the representations on this

HBGQATIC

1 matter and we are awaiting to hear.

2 THE COURT: Maybe you could speak with Mr. Rocco and
3 put U.S. officials in touch with whomever told him that the
4 government wouldn't care if they weren't compulsory and close
5 the loop or something like that.

6 MR. LOCKARD: We haven't received that name. If they
7 have that name, we're happy to pass it along.

8 THE COURT: OK.

9 MR. ROCCO: Thank you, your Honor.

10 THE COURT: All right. So I think are we done.

11 MS. FLEMING: I'm just checking. I thought
12 Mr. Lockard might have something. I'm checking over the list.

13 MR. ROCCO: Your Honor, this is --

14 THE COURT: I'm really recommending that you all stay
15 after we adjourn and hash out as much as you can and also
16 winnow the issues down that would need to be discussed on
17 Tuesday at 2:00.

18 MR. ROCCO: Judge, I hate to make this sound like a
19 shopping list, but there are filings under seal. This is not
20 something we can deal with the government with. We've raised
21 it, but we need the Court's help if anything is to be done
22 here. There were legal filings roughly two weeks ago,
23 actually, I think today that essentially cut off or are tied to
24 our Rule 16 requests and also to the government's Brady
25 obligations.

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1 Quite frankly, Judge, that puts us in a terrible
2 dilemma, in a terrible bind as far as Mr. Atilla is concerned
3 because we don't know what these materials are. And by
4 definition, they are material to defense if they are covered by
5 Rule 16. I don't know what was submitted --

6 THE COURT: They may or may not be, it seems to me.

7 MR. ROCCO: Well, I think the government made that
8 representation that they are not, but Ms. Fleming and I have
9 been doing this for a little while, and both of us have a very
10 hard time figuring out how that can be true. It's an oxymoron.
11 If it's Rule 16 material, it's Rule 16 material, it's material
12 to the defense. Obviously, if it's Brady material, it's
13 material to the defense.

14 I don't understand how the government and how any
15 statute essentially repeals or rolls back a client's right to a
16 fair trial, and, quite frankly, if this is material that bears
17 on our defense, we're entitled to it.

18 THE COURT: You should talk further with them.

19 MR. ROCCO: We will, and maybe they can educate us,
20 Judge. Thank you. But we really did want to put that on the
21 record.

22 MS. FLEMING: One other thing, a heads up. I'm sure
23 we can deal with it Tuesday, but I don't know if you would
24 allow us to submit it. In light of the recent media coverage
25 that's been going on with recent attacks with revelations about

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1 Michael Flynn and whatever role he has had with the Turkish
2 government, we may want to submit some additional questions for
3 voir dire.

4 THE COURT: Oh. Well, you should do that ASAP.

5 MS. FLEMING: OK.

6 THE COURT: You can do that. Rest assured that my
7 effort here is certainly to provide Mr. Atilla with a fair
8 trial. That's fundamental.

9 MS. FLEMING: We are trying to live within your rules,
10 Judge, and I'm sorry we're doing a shopping list, but we wanted
11 to make sure we covered it. Could we get you questions Monday?
12 Would that be adequate before we start picking a jury?

13 THE COURT: We're doing that Monday. It would have to
14 be today.

15 MR. ROCCO: Your Honor, can we do it over the weekend?

16 MS. FLEMING: It's not going to be a lot.

17 THE COURT: It wouldn't be a lot.

18 MS. FLEMING: It's going to be a couple questions.

19 MR. ROCCO: It's going to be a handful, five or six
20 questions.

21 THE COURT: Maybe you could email them to the chambers
22 email address. If you don't have that, Ms. Murray will give it
23 to you.

24 MS. FLEMING: We'll share them with the government,
25 obviously.

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1 THE COURT: OK. I think that's it.

2 MS. FLEMING: Just on the subpoenas, I just would ask
3 the Court allow us to serve them under *Touhy*, and we will make
4 sure a cover letter goes saying we're waiting to hear from the
5 government but we need to give you advance notice and serve the
6 subpoenas on people. Could we do that, please?

7 THE COURT: I don't have a problem.

8 MS. FLEMING: Thank you.

9 THE COURT: Thanks. Nice to see you all.

10 MR. ROCCO: Your Honor, one final question. My client
11 has asked me repeatedly to ask the Court, and, quite frankly,
12 it does go a bit to trial planning.

13 Is Mr. Zarrab going to be on trial with Mr. Atilla or
14 not?

15 THE COURT: So the one perk that comes with being a
16 judge is you don't have to answer questions, as witnesses do
17 and lawyers do. I'd say just keep your eye on the docket and
18 the materials.

19 MR. ROCCO: Thank you, your Honor.

20 MS. FLEMING: Thank you, your Honor.

21 (Adjourned)